UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES H. TYLER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 00-0060 (RWR)**
	)	
WILLIAM J. HENDERSON, Postmaster General, United States Postal Service	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Plaintiff James H. Tyler has brought this action alleging violations of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e et. seq., and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et. seq. In his complaint, he alleges that the United States Postal Service ("U.S. Post Office" or "Post Office") discriminated against him on the basis of race, color, religion, and national origin. See Complaint ("Cplt") at ¶ 1. He also alleges that the Post Office discriminated against him on the basis of age and sex, and retaliated against him for engaging in prior EEO activity when it failed to promote him to a supervisory position within the Post Office. Id. at ¶ 7. The Post Office has filed a motion to dismiss or in the alternative, a motion for summary judgment ("Mot. to Dism."),

arguing that the plaintiff failed to exhaust his administrative remedies for his race, color, religion and national origin claims, and failed to bring his remaining Title VII and ADEA claims in federal district court before the applicable statutory deadline. It argues in the alternative that the complaint must fail as a matter of law because the defendant has failed to establish a prima facie case of discrimination. Because the plaintiff did fail to exhaust his administrative remedies for his race, color, religion, and national origin claims, and because the plaintiff failed to bring his age, sex, and retaliation claims in a timely manner, the defendant's motion will be granted.

BACKGROUND

Plaintiff James H. Tyler is a sixty-year old man who applied for a promotion to a supervisory position in December 1994. See Cplt. at ¶¶ 4, 6. A selection committee composed of one white female who was over the age of forty, one Hispanic female who was over the age of forty, and one black male evaluated all of the applications which they received for the position. See Garcia Declaration ("Decl.") at ¶ 3, 4, 7; Bills Decl. at ¶ 3. Applicants for the position had to respond to a series of questions following the "STAR" format -- for each question, the applicants had to identify a

"situation" or "task" he or she actually faced, the "action" that was taken, and the "result" of the action. See Garcia Decl. at ¶ 11. Based on their responses to these questions, the applicants were placed in one of three ratings categories -- basic, average, or superior. See id. at ¶ 12. Those applicants who received a "basic" rating did not advance to the next level of consideration. Id.

Tyler received a "basic" rating. See Defense Exhibit ("Def. Exh.") 4. The reviewers based their rating on the fact that his application was not well-written, it was handwritten rather than typewritten, and several of his responses were unintelligible. See Garcia Decl. at ¶ 16; Bills Decl. at ¶ 23. Furthermore, he did not follow the "STAR" format in many of his responses but instead, simply restated his current job responsibilities. See id.[1] Though the plaintiff had been with the Post Office for over twenty-eight years, the selection committee weighed other factors more heavily than number of years of service at the Post Office. See Plaintiff's Summary Judgment Response ("P. Resp.") at 2; see also Garcia Decl. at ¶ 22; Bills Decl. at ¶ 22.

[1] The committee also identified a number of other problems with his application before deciding to deny him the promotion. See Bills Decl. at ¶ 23.

The plaintiff filed his initial informal complaint with the Post Office's Equal Employment Opportunity office on October 5, 1995, see Def. Exh. 10, alleging discrimination on the basis of sex and age, and retaliation for prior EEO activity. See id. He later filed a formal charge with the Equal Employment Opportunity Commission ("EEOC"). See Def. Exh. 12. After investigating the complaint, the EEOC granted summary judgment to the defendant on May 27, 1998, and on July 16, 1998, the Postal Service issued a Final Agency Determination ("FAD") of no discrimination. See Def. Exhs. 13-14. This decision was affirmed by the EEOC's Office of Federal Operations on September 17, 1999, at which point Tyler was advised of his right to seek review in federal district court within 90 calendar days of receiving the notice. See Def. Exh. 15. The defendant appears to have acknowledged receipt of the notice on October 8, 1999. See Def. Exh. 19. The ninety-day period ended on Thursday, January 6, 2000. Tyler filed his action in federal district court on January 10, 2000. See Cplt. at 1.

DISCUSSION

Defendant has moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6).[2] Where, as here, the motion to dismiss presents matters outside of the pleadings, the motion shall be treated as one for summary judgment. See Fed. R. Civ. P. 12(b); see also Cleveland County Ass'n v. Cleveland County Bd. Of Comm'rs, 142 F.3d 468, 472 n.7 (D.C. Cir. 1998); Holland v. D.C., 71 F.3d 417, 421 n.4 (D.C. Cir. 1995). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Accordingly, "a party is only entitled to summary judgment if the record, viewed in the light most favorable to the nonmoving party, reveals that there is no genuine issue as to any material fact." Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1288 (D.C. Cir. 1998) (en banc). As the movant, defendant carries the initial burden of identifying evidence that demonstrates the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the non-moving party fails to refute this evidence and

[2] The defendant has also moved under Rule 12(b)(1). I need not address this prong of defendant's motion given my disposition of the remainder of defendant's arguments.

raise genuine issues of material fact, the court may assume that those facts identified by the moving party are, then, admitted. See Local Civ. Rule 56.1.

Because the plaintiff appears pro se, he must be held to "less stringent standards" than would be the case if he were represented by counsel. See Spannaus v. Federal Election Commission, 990 F.2d 643, 645 (D.C. Cir. 1993). Despite this consideration, a pro se plaintiff must nevertheless follow the rules governing civil actions. Id. In Spannaus, the court of appeals affirmed the district court's dismissal of a pro se complaint as untimely because the lower court had simply "followed the legislature's direction, [and] contravened no due process right to fundamentally fair procedures." Id. A pro se plaintiff, then, must exhaust administrative remedies when necessary, and file complaints timely or plead good reasons for any delays.

Race, color, national origin, and religion claims

The plaintiff claims that the Post Office discriminated against him on the basis of race, color, national origin, and religion when it failed to promote him in 1995. See Cplt. at ¶ 1. The defendant argues that these claims are barred because the plaintiff failed to exhaust his administrative

remedies with respect to those claims by *never raising them* before filing this complaint. See Mot. to Dism. at 14.

Prior to filing suit, a Title VII plaintiff must exhaust his administrative remedies, following the requirements set forth in 29 C.F.R. Part 1614. If a plaintiff believes that he or she has been discriminated against on the basis of race, color, religion, sex, national origin, age, or handicap, he must consult an EEO counselor in an effort to solve the situation informally. See 29 C.F.R. § 1614.105(a). This contact with the EEO counselor must occur within forty-five (45) days of the alleged discriminatory incident. See id. at § 1614.105(a)(1).

These procedural requirements governing a plaintiff's right to bring a Title VII claim in court are not unimportant. "[I]t is part and parcel of the Congressional design to vest in the federal agencies and officials engaged in hiring and promoting personnel 'primary responsibility' for maintaining nondiscrimination in employment." Kizas v. Webster, 707 F.2d 524, 544 (D.C. Cir. 1983). "Exhaustion is required in order to give federal agencies an opportunity to handle matters internally whenever possible and to ensure that the federal courts are burdened only when reasonably necessary." Brown v. Marsh, 777 F.2d 8, 14 (D.C. Cir. 1985). The consultation

deadline allows an employer to investigate promptly before evidence becomes stale. See, e.g., Delaware State College v. Ricks, 449 U.S. 250, 256-57 (1980)(stating that the Title VII administrative filing requirement protects employers from the burden of defending claims that arise from decisions that were made long ago).

In this case, the defendant asserts that the plaintiff never raised his race, color, national origin, or religion claims with the EEO officer. In support of that assertion, the defendant provided a copy of plaintiff's administrative complaint. See Def. Exh. 10. The complaint of discrimination was limited to claims based on age and sex, and alleged retaliation for past EEO activity. See id. The complaint did not allege discrimination on any other basis. In his response, the plaintiff has not disputed the authenticity of the copy of the complaint, nor has he furnished any other evidence that he pursued these very dated race, color, national origin and religion claims with the agency before filing this action. Given plaintiff's failure to dispute defendant's assertion, it will be accepted by the court as true. Since there is no genuine dispute over the fact that the plaintiff did not assert those claims with the agency first, as he was required to do, I will grant the defendant's motion

for summary judgment as to plaintiff's claims for discrimination based on race, color, national origin and religion.

Age, Sex, and Retaliation Claims

Plaintiff also alleges that the Post Office discriminated against him on the basis of sex and age, and retaliated against him for his prior EEO activity, when it denied him the promotion, in violation of Title VII and the ADEA. Under both Title VII and the ADEA, a plaintiff who seeks to file a civil action in federal district court after pursuing his administrative remedies must do so within 90 days of receiving the EEOC's final decision when that notice follows an administrative appeal. See 42 U.S.C. § 2000e-16(c) (Title VII); see also 29 C.F.R. § 1614.407(c)(2000) (ADEA).

This statutory deadline under Title VII is not jurisdictional. Instead, it is akin to a statute of limitation that can be equitably tolled in the appropriate circumstances. Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95-96 (1990); Mondy v. Sec'y of the Army, 845 F.2d 1051, 1057 (D.C. Cir. 1988)(holding that the Title VII time limit for filing a civil action was subject to equitable principles). Although Irwin did not specifically address the 90-day deadline under the ADEA, the Court sought "to adopt a

more general rule to govern the applicability of equitable tolling in suits against the Government," and "[held] that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." Id. This language may suggest that the Supreme Court would find equitable tolling available to federal employee plaintiffs in ADEA cases as well. Neither that court nor the D.C. Circuit, though, has decided this issue.[3] Both before and after Irwin, however, the D.C. Circuit *did* find that statutory filing deadlines for actions against the government under other statutes are mandatory, jurisdictional and unalterable. See, e.g., AFL-CIO v. Occupational Safety and Health Administration, 905 F.2d 1568 (D.C. Cir. 1990) (deadline under Occupational Safety and Health Act for seeking circuit review of final agency rule); Spannaus v. Federal Election Commission, 990 F.2d 643 (D.C. Cir. 1993) (deadline under Federal Election Campaign Act for seeking judicial review of FEC's dismissal of administrative

[3] In Smith v. Dalton, 971 F.Supp. 1, 3 (D.D.C. 1997), a Title VII and ADEA case against the Navy Secretary, the court stated that "[t]he court has the power to toll the statute of limitations imposed by Title VII *and ADEA.*" (Emphasis added). The cases cited seemingly in support of that proposition, though, were Title VII cases, not ADEA cases. See Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147 (1984); Mondy v. Sec'y of the Army, 845 F.2d 1051 (D.C. Cir. 1988).

complaint); Jordan v. Federal Election Commission, 68 F.3d 518 (D.C. Cir. 1995) (same). This duality may counsel against declaring today that ADEA's deadline is subject to equitable tolling. Nevertheless, in this case, the issue need not be resolved. As is explained below, the facts here would not warrant equitable tolling for plaintiff's ADEA claim even if such tolling were available.

The claim of untimeliness is an affirmative defense that must be pled by the defendant. See Bowden v. U.S., 106 F.3d 433, 437 (D.C. Cir. 1997). The plaintiff shoulders the burden, however, of proving facts which support a ruling that he may equitably avoid the consequences of his untimeliness. Id. In Irwin, the defendant's attorney received a right-to-sue notice from the EEOC while he was out of the country, but the defendant claimed that he did not receive a copy of the notice himself until fifteen days after the letter had been received by his attorney's offices. See Irwin, 498 U.S. at 90-91. The plaintiff made an equitable claim, arguing that the clock should not have begun to run until he personally received notice from the EEOC. See id. at 93.

Though it held that this statutory limitation was subject to equitable considerations, the Court found that it would be inappropriate to apply them in that case. Id. at 95-96.

While analyzing the plaintiff's claim, the Court noted that "tolling [was permitted] in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." Id. at 96. Service on the plaintiff's representative constituted notice of his right to sue, and the untimely district court filing resulted from nothing more than attorney neglect. Id. at 92, 96.

Here, the defendant argues that the plaintiff received the notice of the EEOC's FAD on October 8, 1999, had until January 6, 2000 to file the complaint in federal district court, but filed late on January 10, 2000. See Mot. to Dism. at 13. In support of that argument, defendant has provided a copy of the return receipt that had been affixed to the FAD that was mailed to the plaintiff. The return receipt purportedly bore the plaintiff's signature and reflected a delivery date of October 8, 1999. See Def. Exh. 19.

The plaintiff has not rebutted this evidence. He has not challenged the authenticity of his signature.[4] He has not alleged that the return receipt acknowledged receipt of any

[4] It appears to match plaintiff's signature on his complaint in this case.

package *other* than the FAD. He has not made any allegations suggesting that the FAD was received on any day other than October 8, 1999. Therefore, the court will accept as true the defendant's contention that the plaintiff received the decision on October 8, 1999.

Furthermore, the plaintiff has failed to assert any equitable claims that would support a decision to toll this statutory limitation. He has never argued that the defendant induced him to file in an untimely manner, nor did he file a defective pleading within the statutory period and then refile a proper pleading outside of it. Rather than asserting any defenses to the limitations argument, the plaintiff merely states in a conclusory fashion that "[the] complaint was timely." See Pl. Resp. at 3. This response is insufficient. The plaintiff here simply failed to file by the deadline. While a plaintiff may understandably clamor for his day in court, a defendant is entitled to rely on statutory provisions which grant repose. There is no genuine dispute over the fact that the plaintiff filed his complaint beyond the statutory deadline without justification. Thus, I will grant the defendant's motion for summary judgment on the plaintiff's age, sex, and retaliation claims.

CONCLUSION

The plaintiff failed to file his race, color, national origin and religion claims with the Post Office, as he was supposed to do, before filing them here. He also filed his age, sex, and retaliation claims with the district court too late. Since these material facts are not in dispute, defendant's motion for summary judgment will be granted. An appropriate order accompanies this memorandum opinion.

SIGNED this _____ day of _____, 2001.

_____
RICHARD W. ROBERTS
United States District Judge